## *Supreme Court of New Brunswick.*

### KAY *v.* THOMSON.

In an action against a surgeon for negligence and unskilfulness, in consequence of which the plaintiff lost his hands and feet, and where the evidence is conflicting, medical men called as scientific witnesses to give their opinions, cannot be asked questions, the answers to which involve the point which the jury have to determine, viz. : the negligence, &c., of the defendant; as, to what they would attribute the loss of the plaintiff's hands and feet.

As a general rule, where improper evidence has been received after objection, the party prejudiced by it has a right to a new trial.

Where defendant died after verdict, and pending a motion for a new trial on his behalf, the ordering the new trial was suspended to enable the plaintiff to apply to the court to impose terms on making the rule absolute.

THIS was an action against the defendant for negligence and unskilfulness as a surgeon in his attendance on the plaintiff, whereby, it was alleged, the plaintiff had suffered great and unnecessary pain, and had lost his hands and feet, and been prevented from continuing a profitable employment in which he was engaged, as superintendent of a copper-mine.

At the first trial of the cause it appeared that the plaintiff was employed as superintendent and manager of a copper-mine, at a place called Jetite, at a salary of £350 sterling per year, to be increased to £450; that in going to his residence from the village of Maguadavic on the night of the 23d December 1865, he lost his way in the snow, and was very severely frost-bitten in his hands and feet; that the defendant (who lived about nine miles distant), was sent for the next day, and attended the plaintiff, dressing his hands and feet, and giving directions for his treatment; that the plaintiff suffered great pain from the injuries, and frequently sent for the defendant during the next twelve days; that the defendant sent him medicine, &c., from time to time, but did not visit him again till the 6th January, when he gave some further directions as to his treatment. Between that time and the 18th January, the plaintiff sent for the defendant several times. On the 18th the defendant again visited the plaintiff, and found his hands and feet in a state of gangrene: the fingers were quite dead, and only connected with the hands by the ligaments and tendons, and the metacarpal bones were protruding nearly half an inch. On this occasion, the defendant cut off the plaintiff's fingers and toes by merely severing the tendons. The plaintiff's sufferings continued after this, and he sent for the defendant two or three times, but as he did not go to him, the plaintiff on the 28th January employed another surgeon, who amputated his hands at the wrist, and a part of his feet. The defendant's contention at the trial was, that the plaintiff's hands and feet were so completely frozen, that all vitality was destroyed, and no skill could have saved them, and that he knew this when he first saw the plaintiff; that his more frequent attendance would have been of no service, as he could have done no more than he did by prescribing poultices, &c., and giving directions

for the plaintiff's treatment; that though amputation might have been performed on the 18th January, it could not have been performed sooner, because the line of demarcation between the parts superficially frozen and the dead parts was not defined until then, and he considered it advisable to wait about ten days longer, to see how far the granulations (which were then forming) would extend down the hand, in order to save as much of the hands as possible; and this, he said, could not properly be known at the time the amputation was performed. A number of medical witnesses were examined on both sides, as to whether the freezing of the plaintiff's hands and feet was superficial or entire, and, if the latter, whether with proper treatment his hands and feet could have been saved; also, whether more frequent visits to the plaintiff were necessary, and whether the amputation should have been performed at an earlier period. The evidence on these points was very conflicting. The jury gave a verdict for the plaintiff for $25,000 damages, and found, in answer to a question left by the judge, that under any circumstances the plaintiff would have lost a portion of his fingers (as far as the second joint). That verdict was set aside for the improper rejection of evidence and for excessive damages. On the second trial a greater number of medical witnesses were examined on the part of the defendant, but the jury did not agree. The case was tried a third time in August 1869, on substantially the same evidence as before, and the plaintiff obtained a verdict for $9000 damages. A rule *nisi* was granted to set aside this verdict on the ground of the improper admission of evidence; that the verdict was against evidence; and excessive damages.

*D. S. Kerr* and *Grimmer* showed cause against the rule in Hilary term last, and *S. R. Thomson* was heard in support of it.

RITCHIE, C. J., delivered the judgment of the court:—

The evidence objected to in this case was that given by the medical men, who, not having any personal knowledge of the case, were called as scientific witnesses to give their opinions, in the nature of experts. The objections taken were as to the form and substance of the questions put, and as to the answers these witnesses were allowed to give.

This description of evidence is founded, not on the personal observation of the witness, but on the case itself as proved by other witnesses on the trial; and when scientific men are called as witnesses, they cannot give their opinions as to the general merits of the cause, but only their opinions on some question of science raised by the facts proved. It is objected here, that the witnesses were asked, and were allowed to give their opinions, on the very point which the jury were to decide. *Folkes* v. *Chadd*, 3 Doug. 157, may be considered the earliest leading case on this subject. It was followed by others; and perhaps some of them are not entirely reconcilable as to the strictly proper form of the question, and the extent to which the witness may be interrogated. In *Jameson* v. *Drinkald*, 12 Moore 157, PARK, J., speaking of nautical witnesses giving their opinions in cases for running down ships, says:—"They ought not to say that they consider the fault to have been either on the one side or the other." And GASELEE, J., in the same case says:

"I am clearly of opinion, that a scientific person, called as a witness, is not entitled to give his opinion as to the merits of a case, but only as to the facts as proved by other witnesses." The cases of *Sills* v. *Brown*, 9 C. & P. 601; *Fenwick* v. *Bell*, 1 C. & K. 312; and *Brown* v. *Brown*, Law R. 1 Prob. & Div. 49, may also be referred to.

But we are relieved from a critical examination of these cases, because in *McNaughten's Case*, 10 C. & Fin. 200, the House of Lords submitted to the judges for their opinion a question which entirely covers the point now in contest before us. The question is in these words:—"Can a medical man conversant with the disease of insanity, who never saw the prisoner previous to the trial, but who was present during the whole trial and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime; or, his opinion whether the prisoner was conscious at the time of doing the act that he was acting contrary to law; or, whether he was acting under any, and what, delusion at the time."

The answer delivered by TINDAL, C. J., was as follows:—"We think the medical man, under the circumstances supposed, cannot in strictness be asked his opinion in the terms above stated, because each of these questions involves the determination of the truth of the facts deposed to, which it is for the jury to decide; and the questions are not mere questions upon a matter of science, in which case such evidence is admissible. But where the facts are admitted, or not disputed, and the question becomes substantially one of science only, it may be convenient to allow the question to be put in that general form, though the same cannot be insisted on as a matter of right."

This was received and acted on by the House of Lords, and must, as the decision of the highest appellate tribunal in the nation, bind all inferior courts.

However difficult or inconvenient in practice, it may be to propound questions or to frame answers so as to bring the examination strictly within the limits so laid down, the burthen is on the party offering such testimony, and from it he cannot escape. We have, with great labor, investigated the learned judge's notes of the trial, extending over some 250 pages of foolscap; and we regret to have discovered, in many instances, clear departures from the prescribed rule, both in the questions proposed and answers given.

The question at issue in this cause was, whether the defendant had been guilty of neglect in the discharge of his professional duties in his attendance on the plaintiff; and the facts were neither admitted, nor uncontradicted; the evidence of the medical witnesses being extremely contradictory.

It will only be necessary to refer to a few of the questions objected to, by way of illustration. Thus, Dr. Gove is asked: "What reliance, in a case like the present, can be put on the report or description of a messenger to the medical man?" This was clearly not a question of science.

Another question was:—"From the plaintiff's statement, and the statement of the witnesses you have heard, how do you account for the destruction of the plaintiff's fingers and toes; or, what caused their destruction?" The answer to this was:—"I think long-continued sti-

mulation of the raw surface produced the destruction or the death of the parts."

But not content with this, the witness is pressed still further by the following question :—"From the evidence before the court, to what do you ascribe the loss of the plaintiff's fingers and toes?"

His answer was :—"I should say, first to non-attendance of the defendant; over stimulation of the inflamed parts." Here, the witness undertakes to determine one of the most important questions of fact in controversy, and in effect, precisely what the jury were to decide on the merits.

Again, Dr. Black was asked the following question :—"From the evidence, to what would you ascribe the loss of the plaintiff's limbs?" His answer was :—"I would ascribe it, first, to frost-bite; second, to neglect in attendance; third, to want of proper treatment."

Nothing could be more objectionable than this answer, if we follow, as we are bound to, the rule laid down by the House of Lords.

The evidence thus pressed in was material, and might have had a most important effect on the minds of the jury. There were only three medical men examined on the part of the plaintiff; and Doctors Gove and Black were material and important witnesses, on whom he mainly relied. The jury, for aught we know, may have adopted their conclusions thus stated on the merits, without themselves at all weighing the facts and opinions in evidence on which those conclusions were based, and without determining whether those facts and opinions warranted the conclusions stated; and which conclusions it was the duty of the jury, and the jury alone, wholly unbiassed, to arrive at.

The law with regard to the right of a party to a new trial where improper evidence has been received against him, is so clear and has been so often acted on in this court, that it is hardly necessary to cite authorities in support of it. In the case of *Bailey* v. *Haines*, 19 Law J. Q. B. 78, where evidence was improperly received, but the jury professed to have found their verdict independent of such evidence, Lord DENMAN expressed, as the opinion of himself and the rest of the judges, that if evidence was wrongly received, it was quite immaterial that the jury professed to have found their verdict independently of it. In *Wright* v. *Doe dem. Tatham*, 7 A. & E. 330, the law is thus explicitly stated by Lord DENMAN: "Sir F. Pollock suggested that we might act upon the example of the Common Pleas in *Doe* v. *Tyler*, 6 Bingh. 561, and might enter upon an inquiry whether, even though this evidence may have been improperly received, there was not proof enough in the cause without it, to warrant the verdict. But, as this court has so lately on full consideration, and in conformity with a decision of the Court of Exchequer, renounced the discretion which was in that case exercised, we need not repeat our reasons for holding that where evidence formally objected to at Nisi Prius, is received by the judge, and is afterwards thought by the court to be inadmissible, the losing party has a right to a new trial." This doctrine was acted on in this court in the cases of *Riley* v. *The Mayor, &c., of St. John* (Easter T. 1864), and *Girvan* v. *The Mayor, &c., of St. John* (Easter T. 1866), and in other cases. All we can say in conclusion on this point is, that if counsel will press in improper evidence after objection made, they must take the consequences which necessarily and legally flow therefrom.

As to the second ground, that the verdict was against evidence, the verdict having been found as we think on improper evidence, it is not necessary, nor, as we conceive, would it be proper for us now to discuss this point.

As to the last ground, that the damages are excessive, as we are now compelled to grant a new trial by reason of the improper admission of evidence, this point does not arise. It is therefore sufficient for us to say that we adhere to the judgment pronounced by us in this cause on a former occasion upon the subject of damages (1 Hannay 297), and the duty of the jury in respect thereto.

As it has come to our knowledge in another cause in this court, that the defendant has died since the verdict, and therefore, as the granting a new trial now, except upon terms, might defeat the ends of justice, we shall refrain from making the rule absolute for a new trial until the next term, in order to afford the plaintiff an opportunity of making any application that he may be advised as to the terms on which the new trial should be granted. On this point we refer to *Griffiths* v. *Williams*, 1 C. & J. 48, and *Freeman* v. *Rosher*, 13 Q. B. 780.

## ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF KANSAS.[1]
SUPREME COURT OF MAINE.[2]
SUPREME COURT OF MICHIGAN.[3]
SUPREME COURT OF MISSOURI.[4]
SUPREME COURT OF NEW YORK.[5]

### BAILMENT.

*Pledgee's Liability—Construction of Receipt.*—A bank is bound to take ordinary care only of United States bonds pledged to it as collateral security for the payment of a note discounted by the bank: *Jenkins* v. *National Village Bank of Bowdoinham*, 58 Me.

A writing, executed by the cashier, acknowledging the receipt by the bank of certain United States bonds from the maker of a note discounted by the bank, "to be returned to him on the payment of his note in four months, dated May 9th 1866," is not a contract which increases the common-law liability of the bank, even if the cashier had the authority to do so: *Id.*

### BANKS AND BANKING. See *Bailment.*

*Deposits—Right of Set-Off.*—It seems that deposits made with a private banker who carries on a general banking business (such as discount-

[1] From W. C. Webb, Esq., Reporter; to appear in 6 or 7 Kansas Rep.
[2] From W. W. Virgin, Esq., Reporter; to appear in 58 Maine Rep.
[3] From H. K. Clarke, Esq., Reporter; to appear in 20 Mich. Rep.
[4] From C. C. Whittelsey, Esq. late Reporter, to appear in 47 Mo. Rep.
[5] From Hon. O. L. Barbour, Reporter; to appear in vol. 59 of his reports.